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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

REPLY COMMENTS OF AOL TIME WARNER INC.

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REPLY COMMENTS OF AOL TIME WARNER INC.

AOL Time Warner Inc., by its counsel, files these reply comments in the above-captioned rulemaking proceeding designed to examine the appropriate legal and policy framework for broadband access to the Internet over existing and future wireline infrastructure of the traditional telephone network.[1] As described below, the Federal Communications Commission ("FCC" or "Commission") should not reverse decades of sound legal and policy conclusions but instead conclude that the public interest is best served by continuing to require incumbent local exchange carriers ("ILECs") to offer their wireline broadband transmission services on existing and future infrastructure to unaffiliated information service providers on nondiscriminatory rates, terms and conditions.

[1] Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10; FCC No. 02-42, rel. Feb. 15, 2002 ("*NPRM*"). Throughout these comments, the term "wireline" is used, as described in the *NPRM*, to refer to "the existing and future infrastructure of the traditional telephone network." *NPRM* at n.1.

INTRODUCTION AND SUMMARY

In its initial comments, AOL Time Warner explained that the FCC has properly classified retail high-speed Internet access services provided to consumers as "information services" and described the consumer benefits that have resulted from the longstanding distinction between these information services and the wireline transmission component that is used by information service providers to deliver them over the public switched telephone network.[2] AOL Time Warner also detailed the FCC's consistent findings in numerous contexts that the high-speed DSL transmission services used by Internet Service Providers ("ISPs") are "telecommunications services" and explained that it, along with thousands of other ISPs, has legitimately relied upon the common carriage access afforded by these wireline services to create successful Internet access offerings to the benefit of millions of consumers.[3] Finally, AOL Time Warner agreed with suggestions in the *NPRM* that regulation to ensure the continued growth and innovation of information services should be narrowly tailored, focusing on non-discriminatory access to broadband wireline transmission services at just and reasonable rates, terms and conditions and effective and swift enforcement.[4] The record underscores the soundness of these positions.

In this proceeding, the FCC is essentially asking whether it should alter the common carrier predicate of our nation's wireline infrastructure that has served the public well for over 100 years by allowing wireline carriers to cease offering high-speed or "broadband" transmission

[2] Comments of AOL Time Warner Inc. at 5-13 (filed May 3, 2002).

[3] *Id.* at 15-22.

[4] *Id.* at 22-29.

services to ISPs pursuant to the Title II common carrier regulatory framework.[5] The comments underscore, however, that to assess whether the ILECs' underlying high-speed transmission services should continue to be treated as telecommunications services, the Commission must consider not only how the ILECs have thus far offered such transmission capacity – which has been as common carriers – but whether there should be a legal compulsion for incumbent wireline carriers to continue to offer their services in this fashion. The answer is plainly yes.

As the United States Supreme Court recently noted – and many commenters in this proceeding have explained – the history of our nation's wireline infrastructure highlights why there should be a continuing obligation for the ILECs to serve the public on an open, nondiscriminatory basis. Our wireline infrastructure is a national resource designed to provide affordable, stable, accessible public communications infrastructure.[6] The "public switched telephone network" operated by the ILECs has been financed, constructed and maintained through decades of monopoly profits derived from captive ratepayers, affording the ILECs a guaranteed rate of return. As such, U.S. consumers – and all end users – have a fair expectation that this common carrier platform will continue to be available to provide new and innovative information services to the public, including high-speed broadband Internet access.

From the early days of wireline services, the former "Bell System" (consisting of the Bell Operating Companies ("BOCs") and their parent, AT&T) have thrived in a regulatory

[5] The large ILECs' pleadings urge the FCC to deregulate broadly all of their "broadband" services, including T1, ATM, Frame Relay and other "data" services. *See e.g.*, Comments of Verizon at 18-21; Comments of SBC at 18-23; Petition of SBC Communications, Inc. That it is Non-Dominant in its Provision of Advanced Services and For Forbearance from Dominant Carrier Regulation of those Services (filed Oct. 3, 2001) at 30-34. ("*SBC Petition*").

[6] *Verizon Communications, Inc. v. FCC,* 122 S. Ct. 1646, 1654-1656 (May 13, 2002) *("Verizon")*; *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 at ¶

environment that allowed expansion and consolidation (through acquisition of competitors) while providing reasonable and assured earnings, in exchange for rate regulation and other requirements consistent with monopoly utility regulation. Operating in this framework, these carriers have built today's wireline infrastructure – consisting largely of the copper plant that is used for the DSL and other services here at issue, and which serves as the foundation for competitive information and telecommunications offerings.

The Commission is being urged in this proceeding by the ILECs to redefine broadband wireline telecommunications services as outside of common carriage in the name of "regulatory parity." Regulatory parity, however, is not now and has never been a statutory goal, and should not be considered an end in itself. Significantly, nothing in the recent decision of the United States Court of Appeals for the D.C. Circuit in *USTA v. FCC* alters this conclusion.[7] The *USTA* Court directed the Commission to consider what impact, if any, cable modem broadband services may have on the need for line sharing. The Commission should appropriately ask the same question in evaluating whether the ILECs should continue to be subject to common carrier obligations when offering broadband transmission service. Such an evaluation, however, does not change the result. Indeed, that cable modem service and DSL may be competitive at the retail level does not overcome the absence of alternative common carrier platforms offering pure transmission service to ISPs. Because cable operators do not offer transmission services to ISPs, the cable modem service (i.e., information service) that is made available to individual

148 (1986) ("We have long recognized that the basic network is a unique national resource…") ("*Computer III*") (*subsequent history omitted*).

[7] *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. May 24, 2002) ("*USTA*").

subscribers provides no justification for altering the current classification of ILEC-provided DSL transmission services as "telecommunications service."

Indeed, if Congress had chosen to promote the goal of regulatory parity rather than competition in the 1996 Act – something Congress considered and rejected – it could have easily done so.[8] Notably, the core assumption of the 1996 Act's market-opening provisions was that continuing federal oversight of incumbent wireline carriers was needed to promote competition, particularly in light of the ILECs' continued bottleneck control over the local loop – the only common carrier platform to facilitate competitive entry for ISPs.[9] Thus, while "regulatory parity" with cable has apparent simplistic appeal, the fact is that our nation's wireline infrastructure and cable television plant have very different histories, with very different assumptions about their value and role in serving Americans' communications needs. On the one hand, subject to common carrier obligations and a guaranteed rate of return, incumbent wireline carriers have deployed the facilities upon which third-party information service providers have relied in building their businesses. Cable operators, on the other hand, invested their own risk capital, with no assured returns, and no third party information service provider ever relied upon the expectation that cable infrastructure would fall within common carrier regulation.

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[8] *Verizon* at 1661-1662; In addition to the once-proposed "Title VII," the Senate bill, S. 652, that formed a basis of the 1996 Act, at one time contained a "regulatory parity" section that directed the FCC "to move to a time when the same set of regulations will apply to the services provided by integrated telecommunications providers." *Telecommunications Competition and Deregulation Act of 1995,* Report on S. 652, 104th Cong., 1st Sess., S. Rep. No. 104-230 at 51 (1995) ("*Senate Report*"). This section was not included in the final legislation.

[9] *Verizon* at 1655.

Moreover, unlike with cable, there are today numerous unaffiliated ISPs who depend upon open and nondiscriminatory access to the ILECs' broadband transmission services to offer DSL-based Internet access to hundreds of thousands of consumers. As such, this is not a prospective, public policy deliberation as to how best to regulate a new service. Instead, in assessing what is in the public interest, the Commission must consider the adverse impact of the proposed ILEC deregulation on existing ISP customers, who in turn could lose the ability to serve consumers.

In addition, much of the ILEC deregulation debate has focused exclusively – and inappropriately – on the investment incentives of only the ILECs. Instead, the FCC must consider how any proposed changes to the existing competitive safeguards would impact not only investment decisions by the ILECs, but investment decisions by those businesses that currently rely upon ILEC transmission services. Nor should the FCC accept the proposition that without deregulation, the ILECs will not make the investments needed to offer broadband services. The ILECs proffered no evidence to support their claims that the FCC's rules ensuring ISPs nondiscriminatory access to ILEC transmission services are somehow inhibiting their ability to deploy services. In fact, history reveals a different scenario. Today, not only has much of the plant needed for DSL already been deployed, but more importantly, the ILECs will continue to make the necessary expenditures precisely because they face competitive pressure.[10] Having prospered under a regulatory framework that has served the ILECs and the public, the

[10] The ILECs developed DSL technology years ago, but did not implement it for data services until they faced pressure from cable. This deployment failure is likely attributable to a desire not to cannibalize their more profitable services, such as T-1. *See e.g.*, Comments of Covad at 21-22; Committee on Broadband Last Mile Technology, National Research Council, *Broadband: Bringing Home the Bits*, at Finding 5.2 (2002) ("*Bringing Home the Bits*").

ILECs cannot, consistent with their history, equity and common sense, be permitted to renounce the common carrier obligations upon which the public and competitors alike have relied.

Finally, as numerous diverse parties emphasize, the FCC should reject attempts to define away the statutory requirements of the 1996 Act and the substantial legal precedent regarding the ILECs' provision of telecommunications services. Not only would such a radical departure from longstanding precedent create massive uncertainty and confusion, it would undermine the legitimate expectations and interests of businesses and consumers. Ultimately, "deregulation" in the name of regulatory parity could well sink the FCC's successful approach to information services competition in a morass of litigation and business uncertainty. Given that the record demonstrates that the proposed reclassification is unfounded and unlawful, the FCC should reject this approach and instead, strive for regulatory certainty to promote the overarching goal of the 1996 Act – competition.[11]

I. THE HISTORY OF WIRELINE CARRIER SERVICES UNDERSCORES THAT COMMON CARRIAGE SERVES THE PUBLIC INTEREST

The history and development of wireline carrier services explain the genesis of and need for today's statutory and regulatory provisions under Title II of the Communications Act.[12] This history paints a picture of entities that have benefited uniquely from regulation, allowing them to deploy their infrastructure while realizing substantial returns and minimizing the risk that

[11] *Verizon* at 1662-1663.

[12] Indeed, three commenters provide a history of common carriage dating back 500 years to explain the applicability of Title II to address problems that arise from private monopolistic control over bottleneck facilities. *See* Joint Comments of WorldCom, the Competitive Telecommunications Association, and the Association for Local Telecommunications Services, at 9-24 ("WorldCom"). *See also* Comments of Covad at 38-47.

virtually all other businesses must face. Now, after affording ILECs the ability to reap the benefits of regulation, it would be contrary to public policy to grant these carriers selective relief from their end of the regulatory bargain simply because they see greater economic advantage in an alternative system.[13]

At the turn of the century, when wireline telephony services were in their infancy, the Bell System recognized the opportunity to use regulation to its advantage.[14] Regulation alleviated pressures from competition, such as rate wars, market instability, and similar "disruptive" influences,[15] and ensured a steady business with consistent earnings.[16] Notably, regulation both increased the difficulty of new entry and provided the substantial benefits of utility regulation, the fruits of which generally continue to accrue to the benefit of the ILECs,

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[13] As explained in greater detail in Section IV, whether or not the ILECs' services may legally be classified as common carriage does not depend solely on the existence or lack of market power. Indeed, there are today myriad "non-dominant" carriers who are without question squarely within the Title II common carriage framework. *See also* Comments of WorldCom at 24.

[14] The Bell strategy, instead of seeking to fend off all competition to secure bottleneck control, included aggressive acquisition of independents, interconnection with non-competing independents, equipment sales to independents; and most notably, regulation. The acquisition strategy ultimately led to the "Kingsbury Commitment," a unilateral letter settling an antitrust investigation by limiting Bell acquisition of directly competing companies and allowing interconnection with independent carriers. While the Kingsbury Commitment prevented a complete takeover of the industry by the Bell System, it also reduced competition with the independents and reflected "an effort to exchange the short run goal of full control of the telephone industry for an increased probability of retaining its existing industry dominance." See Gerald W. Brock, <u>The Telecommunications Industry: the Dynamics of Market Structure</u> 155-156 (Harvard University Press 1981) ("Brock"). Further, interconnection actually served to increase Bell control by giving the independents a direct stake in Bell's success rather than to enhance the ability of the independents to gain competitive ground. Brock at 155-156.

[15] R. Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 Law and Contemporary Problems 340 (1969) ("Gabel").

[16] Indeed, Bell's chief executive, Theodore Vail, urged that: "I am not only a strong advocate for control and regulation but I think I am one of the first corporation managers to advocate it. It is as necessary for the protection of corporations from each other as for protection to, or from, the public." Brock at 159 *citing* T.N. Vail, "Some Truth and Some Conclusions," speech to Vermont State Grange, Dec. 14, 1915, A.T.&T. Historical File, New York.

including the right of eminent domain and control over rights-of-way, limits on competitive entry, guaranteed returns and exclusive franchises.[17]

In 1934, when the Communications Act was enacted establishing the FCC, wireline carrier industry practices were largely maintained. Title II of the 1934 Act ("Common Carriers"), required carriers, among other things, to post tariffs in advance, to seek approval for extension or discontinuance of lines and to interconnect as compelled by the Commission.[18] Even after the 1934 Act's delineation of specific wireline common carrier obligations, strategic use of regulation continued, allowing the Bell System to retain its control of the nation's vital wireline infrastructure.[19] Indeed, in 1982, the adoption of the Modification of Final Judgment ("MFJ") (known as the "AT&T divestiture") that divided Bell's wireline services into long distance and local services, was predicated on the assumption that granting the BOCs regulatory protection to preserve their local bottleneck control was in the public interest.[20]

[17] Historians have noted that regulation at both the state and federal levels did little or nothing to curb the ability of the Bell System to enjoy high returns. Brock at 160 *citing* Stehman, Financial History of AT&T at 261-262. During the 24 years (1910-1934) that the Interstate Commerce Commission regulated telephony, it dealt with only four cases, none of which involved issues of major importance. Gabel at 357.

[18] Brock at 178-179.

[19] For example, regulation assisted Bell to repel challenges posed by reduced barriers to entry due to technological innovation and the 1949 federal antitrust suit (naming both AT&T and Western Electric) that threatened to break up the company. Brock at 177-197. *See also U.S. v. AT&T*, 552 F. Supp 131 (D.D.C. 1982) at 135-136 (describing 1949 antitrust action alleging monopoly and conspiracy to restrain trade in the manufacture, distribution and sale of telephone equipment). In 1956, AT&T entered into a Consent Decree that essentially restricted it to the provision of common carrier communications services, restricted its manufacturing arm, Western Electric, and required liberal licensing of Bell patents. Brock at 193. Competition gradually emerged on four separate fronts, largely driven by technological advances and court intervention. These include long distance services, customer premises equipment ("CPE"), enhanced services and wireless services. *See* Brock at 213-219; *See also* Economics and Technology, Inc., Hatfield Associates, Inc., *The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers* at 6-7 (1994).

[20] *U.S. v. AT&T*, 552 F. Supp. at 229; *Verizon* at 1654-1655; Comments of WorldCom at 17-18. The MFJ reflected concerns about four types of abuses of monopoly power: interexchange services, information services, terminal equipment, and switching and transmission equipment. *See generally* W. Lavey and D. Carlton, "Economic Goals

This history is important because the broadband services the ILECs seek to redefine in this *NPRM* as outside of common carriage are deployed largely on existing infrastructure – the very infrastructure that the Supreme Court recently reaffirmed is a bottleneck and that was built with earnings from regulated services.[21] This infrastructure affords the ILECs enormous market advantages and economies of scale, scope and ubiquity as a result of their historic, government-sanctioned monopolies.[22] Indeed, DSL services, which the ILECs cast as the most relevant ILEC services in this *NPRM*,[23] are today generally provided via the ILECs' loops and subloops.[24] This copper plant is not "new" architecture, requiring new and risky investment but rather, the very infrastructure that has already been paid for by regulated rates.[25] In fact, the costs of loop plant of shared line DSL services have already been allocated to (and paid for) by voice services,[26] which is why some states are considering a permissible rate for the subloop of zero.[27]

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and Remedies of the AT&T Modified [sic] Final Judgment," *reprinted in* Telecommunications and the Law: An Anthology, W. Sapronov, Ed., Computer Science Press, 1988, at 237-244.

[21] *Verizon* at 1674-1677.

[22] *Id.* at 1654-1656. The FCC has recognized as much. *See e.g.,* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 at ¶ 86 (*"UNE Remand Order"*), *vacated on other grounds, USTA v. FCC,* 290 F.3d 415 (D.C. Cir. May 24, 2002). The FCC stated that these competitive attributes: [w]ould belong unquestionably to the incumbent LECs if they had "earned" them by superior competitive skills. These advantages of economies, however, were obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies." *Id.*

[23] As discussed in Section II, *infra*, the ILECs may present the issue as a battle between DSL and cable modem services, but in reality, they actually seek much broader relief, asking the FCC to eliminate common carrier requirements for all "broadband" services, defined by them as all services above 56 kpbs and all packet services. *See e.g.,* Comments of Verizon at 5-6; *see also SBC Petition.*

[24] *See e.g., Bringing Home the Bits* at 47.

[25] *Id. See also,* Letter from Vinton G. Cerf, Senior Vice President Internet Architecture and Technology, WorldCom, to Hon. Donald Evans, Secretary, U.S. Dept. of Commerce and Hon. Michael Powell, Chairman, FCC (May 20, 2002).

[26] *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, CC Docket No. 98-147 and Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 at ¶ 133

It is against this backdrop of history that the FCC through its regulatory framework (including the seminal *Computer Inquiries*), and Congress in the 1996 Act, explicitly detailed the rights of competitors and the obligations of incumbent wireline carriers. For purposes of this *NPRM*, it is also significant that the strategy of the BOCs to use regulation to their economic advantage has remained largely unchanged from the early days until today. Just recently, one study indicates that at the same time BOCs are today complaining about being held back by government regulations, the four largest ILECs gain $29 billion annually as a result of regulation.[28] Having deployed their wireline facilities with regulated ratepayer dollars, the ILECs should not now be permitted to deprive the public of the competitive benefits flowing from new and innovative broadband information services provided over their common carrier facilities. Rather than seek to eliminate existing safeguards, the Commission should steadfastly ensure that its principles endure and are effectively enforced.

(1999), *vacated on other grounds, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. May 24, 2002) ("In setting prices for interstate xDSL services, moreover, incumbent LECs currently attribute little or no loop costs to those services."); *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15846 ¶ 679 (1996).

[27] *See e.g., Petition of Rhythms Links, Inc. Against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Public Utility Commission of Texas Memorandum, Docket No. 22469, at 10 (May 23, 2002 Open Meeting).

[28] *See* Lee L. Selwyn, *Subsidizing the Bell Monopolies: How Government Corporate Welfare Programs are Undermining Telecommunications Competition*, Economics and Technology, April 2002.

II. REGULATORY PARITY MUST NOT BE ELEVATED ABOVE THE PUBLIC INTEREST

The essential ILEC argument for reclassification of wireline broadband services is that it will foster "regulatory parity" between wireline carriers and cable operators.[29] Not only is this argument unavailing as a matter of law, it fails to recognize the inherent differences between wireline carriers and cable operators and should be rejected as a matter of policy.

As a threshold matter, the FCC should recognize that regulatory parity is not an end in itself.[30] To be sure, the Communications Act and the 1996 Act direct the Commission to consider multiple goals and policies in fulfilling statutory directives, including competition, the unfettered growth of the Internet and information services, the provision of new technologies and services, and the deployment of advanced telecommunications capability to all Americans.[31] Thus, while the *NPRM* notes that the FCC "will strive to develop an analytical framework that is consistent, <u>to the extent possible</u>, across multiple platforms,"[32] there is also an express recognition that legal, market and technological distinctions may require different regulation and

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[29] *See e.g.,* Comments of BellSouth at 12-15; Comments of Verizon at 23-29; Comments of SBC at 12.

[30] The Commission has repeatedly recognized that regulatory parity for its own sake is not generally required by any provision of the Communications Act or when it is contrary to the public interest. *See Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals,* 15 FCC Rcd 21688 at ¶ 35 (2000) (declining to impose identical non-duplication, syndicated exclusivity, and sports blackout protection on DBS providers and cable operators); *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities,* 16 FCC Rcd 6417 at ¶ 116 (1999) (declining to impose identical penalty provisions on equipment manufacturers and service providers for violations of the accessibility requirements); *Direct Broadcast Satellite Public Interest Obligations,* 13 FCC Rcd 23254 at ¶ 60 (declining to impose identical public interest obligations on DBS providers and cable operators).

[31] *See e.g.,* 47 U.S.C. §§ 157 (encourage new technologies and services); 230 (promote and preserve vibrant and competitive market for Internet); 157 nt (Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706")) (encourage reasonable and timely deployment of advanced telecommunications capability).

[32] *NPRM* at ¶ 6 (emphasis added).

that "a consistent analytical framework may not lead to identical regulatory models across platforms."[33]

In short, while the Commission may be sympathetic to the simplistic attraction of apparent absolute regulatory symmetry, the FCC should not treat regulatory parity as a goal in itself – it is only of value insofar as it can be demonstrated to enhance consumer welfare, thereby serving the public interest. Indeed, the Commission has already recognized that it can be illogical to treat offerings alike simply because they may be in some sense "substitutable."[34] As such, the FCC should not leap to a conclusion since cable operators offer retail information services to consumers,[35] that they necessarily offer or should offer common carrier telecommunications services to ISPs or that they should be regulated in the same way as wireline carriers. As the FCC noted in its companion cable proceeding, the services offered by cable operators are not today and have never been determined to be offered as common carriage.[36]

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[33] *Id.* at ¶7 (emphasis added).

[34] *Id.* at ¶¶ 6-7. *See also* Federal State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501 at ¶99.

[35] *See In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable And Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* GN Docket 00-185, CS Docket 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, Rel. March 15, 2002, at ¶ 33 ("*Cable Broadband Ruling and NPRM*").

[36] *Id.* at ¶¶ 39-40, 48-55. Rather than utilize a wholesale telecommunications service model, such as exists today in the wireline arena, Time Warner Cable ("TWC") is offering consumers a choice among multiple ISPs based on a "retail partnership" model where TWC and unaffiliated ISP partners jointly bring retail services to consumers. *See* Letter from Steven N. Teplitz, Vice President and Associate General Counsel for Communications Policy and Regulatory Affairs, AOL Time Warner, to Royce Sherlock, Deputy Chief, Policy and Rules Division, Cable Services Bureau, Federal Communications Commission, GN Docket No. 00-185 (Jan. 22, 2002) (explaining that Time Warner Cable partners with affiliated and unaffiliated ISPs to offer jointly an information service to end-users, but does not sell wholesale transmission services to ISPs); *See also Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation*, MB Docket No. 02-70, "Applications and Public Interest Statement" at 92-95 (filed Feb. 28, 2002); Comcast Corp., *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002, http://www.comcast.com/press_room/viewrelease.asp?pressid=130 ; AT&T, *AT&T Broadband – Comcast Merger*

Moreover, the FCC and Congress have recognized the particular historical underpinnings of wireline services, reinforcing the duty to ensure that telecommunication services continue to be available and open.[37] Thus, with respect to what is at issue in this proceeding – the offerings of wireline carriers – the FCC should continue to stay the current legal, regulatory and policy course.

Moreover, as noted above and as commenters have explained, cable operators and wireline carriers have been regulated differently because they have deployed different networks for different purposes.[38] While wireline carriers have always earned regulated returns (whether through rate-of-return regulation or price caps), cable operators have invested risk capital with no guarantee of earnings. Moreover, since the passage of the Cable Act in 1984, the cable industry has been subject to different, but extensive, regulation at the federal and local level. Indeed, the consistent regulatory paradigm of Congress has been to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."[39] Today, local authorities regulate many aspects of a cable operator's consumer services, including

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Will Create More Competitive Marketplace (press release), Apr. 23, 2002, http://www.att.com/news/item/0,1847,10302,00.html; *Cable Broadband Ruling and NPRM* at ¶ 26.

[37] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* CC Docket Nos. 96-61 and 98-183, Report and Order, 16 FCC Rcd 7418 at ¶ 46 (2001) ("*CPE/Enhanced Services Unbundling Order*") (citing, *inter alia, Resale and Shared Use,* 60 FCC 2d 261 (1976), *aff'd sub nom. AT&T v. FCC,* 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 895 (1978)); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore,* CC Docket No. 79-252, Further Notice of Proposed Rulemaking, , 84 FCC 2d at 456-63, ¶¶ 33a-53. ("*Competitive Carrier FNPRM*"); *Telecommunications Act of 1996,* Conference on S. 652, 104th Cong., 2d Sess., H. Rep. 104-458 at 131-132 (1996) ("*1996 Act Conference Report*").

[38] *See e.g,* Comments of Covad Communications Company at 59-65.

[39] 47 U.S.C. § 521(3).

network build-outs, service quality, franchise fees, and basic rates.[40] At the federal level, the FCC regulates the activities and sets a myriad of obligations for cable operators and cable systems on a wide range of subjects.[41] The extent of FCC regulation of cable operator activities and cable system operations is significant; including such issues as mandatory carriage of television broadcast signals,[42] certain contractual arrangements with cable programmers,[43] and technical and operational standards for cable systems.[44] Further, cable systems using Cable Television Relay Service microwave transmission under Part 78 of the FCC's rules are subject to additional technical and licensing requirements.[45] In short, blind adherence to "regulatory parity," would require relieving cable operators of numerous regulatory obligations not presently applicable to ILECs, while at the same time affording cable operators various regulatory advantages, such as eminent domain rights, enjoyed only by ILECs.

In addition, Congress has implicitly rejected the notion that the existence of cable as a potential competitor for some services means that ILECs should be relieved of their common carrier and unbundling obligations as to their wireline infrastructure. In adopting the 1996 Act, Congress recognized that cable operators offered a significant potential to provide facilities-based voice services in competition with incumbent wireline carriers.[46] Yet, Congress did not

[40] *See e.g.*, 47 U.S.C. §§ 541 (franchising); 542 (franchise fees); 543 (rate regulation).

[41] 47 C.F.R. § 76.1, *et seq.*, § 76.1300 *et seq.*

[42] *Id.*, § 76.56.

[43] *Id.*, § 76.1000, *et seq.*

[44] *Id.*, § 76.601, *et seq.*

[45] *Id.*, § 78.1, *et seq.*

[46] "Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local competition that has consistently been contemplated." *1996 Act Conference Report* at 148. The FCC has noted how, "[a]t the time of the 1996 Act, it was expected . . . that cable operators would provide

provide in the Act or suggest that this competition would allow the ILECs to evade common carrier requirements.[47] The reason is clear – the 1996 Act was predicated on the continued wireline offerings of the ILECs as common carriers.[48] In light of these different histories, it is reasonably understood why the fundamental goal of the 1996 Act was the promotion of competition not regulatory parity; Congress acknowledged that there were and are different regulatory schemes for various entities and services and in fact, specifically rejected a "parity" approach when adopting the 1996 Act.[49]

The FCC should reject the ILECs' current pleas for regulatory parity as little more than a smokescreen for elevating private interests over the public interest. In fact, despite the steady ILEC drumbeat that there must be parity between cable modem and DSL service,[50] the ILECs continue to urge the FCC to expand the scope and impact of this proceeding to cover all services above 56 kbps including Frame Relay, T-1, ATM, high-capacity loops, all packet-switched services,[51] etc. – services for which they generally already have a clear course for deregulation

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local telephone exchange service," and how, currently, "several cable MSOs offer telephone service. Circuit-switched telephony is still the only type of commercially deployed cable telephony....MSOs, such as Cox and AT&T, continue to deploy circuit-switched cable telephony." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report, 17 FCC Rcd 1244 at ¶ 10 (2002).

[47] To the contrary, Congress stated that under certain specified circumstances, competing carriers could be subject to the additional regulatory obligations of incumbents. 47 U.S.C. § 251(h)(2).

[48] "This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant." H.R. Rep. No. 104-458 at 148 (1996).

[49] *See Senate Report, supra at* n.8.

[50] To the extent the Commission determines that the retail offering of cable modem service and the retail offering of an ILECs DSL-based Internet access service are both classified as unregulated information services, "regulatory parity" will be in place.

[51] *See e.g.,* Comments of SBC at 10-12; *SBC Petition* at 30-34; Comments of Verizon at 5-6.